IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-91

RODNEY ALEXANDER, and

ANDREW LEE OWENS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Rodney Alexander and Andrew Lee Owens, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on June 12, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported and is contained in Appendix A hereto, infra, page 27. The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, is not printed. Petitioners were tried in the District Court by a jury and convicted and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A) was entered on June 12, 1979. The jurisdiction of the Supreme Court is invoked under the provisions of Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals applied an unconstitutional standard of review when it passed on the issue of

petitioners' motion for judgment of acquittal.

2. Whether the petitioners were denied a trial by an impartial jury beccause of the coercive actions of the Trial Court in giving supplemental instructions.

3. Whether the petitioners' rights to due process of law were violated when the Court of Appeals failed to pass on one of the appeal points.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of the United States Constitution, United States Code, and Supreme Court Rules are set forth in Appendix B at page 31.

STATEMENT

On April 29, 1976, Petitioners Rodney Alexander and Andrew Lee Owens, along with Mack Rhoads and Dominic Savino, were charged in a two-count indictment

with conspiracy to possess and possession of 504 boxes of stolen beef by a United States Grand Jury for the Northern District of Illinois, Eastern Division, under Title 18, United States Code, Sections 371 and 659.

Trial was held before a jury with the Honorable J. Sam Perry, Senior U.S. District Court Judge presiding, beginning on February 13, 1978.

At the close of the Government's case in chief, the petitioners moved for a judgment of acquittal which was denied as to Count I and taken under advisement as to Count II by the Trial Court.

After the jury was instructed and started deliberations on February 16, 1978, it sent an inquiry to the Trial Court to request a definition of possession. The Trial Court read two instructions it had previously read dealing with possession. Later that same day, the jury

sent another note to the Trial Court asking it to define the second clause in the indictment. The Trial Court gave the jury a copy of the whole indictment in answer to the inquiry. Still later that same day the jury sent another note to the Trial Court requesting a re-reading of Title 18 U.S.C. Section 659. Over the objections of the petitioners, the Trial Court re-read the particular instruction. The next day, February 17, 1978, the jury sent a fourth note to the Trail Court asking for the definitions of embezzled, stolen, and unlawfully taken and the relation of intent. The Trial Court refused to further instruct the jury and over objections by the petitioners sent additional verdict forms to the jury and commented to them, among other things, that "it would be useless to have to declare a mistrial if you are unable to render a complete verdict".

The jury returned a verdict of guilty on Count I of the indictment. The Trial Court granted the petitioner's motion for acquittal as to Count II.

Petitioners filed notice of appeal on May 3, 1978, contending they were denied a trial by an impartial jury through the improper coercion exercised by the Trial Court on the jury, that the evidence was insufficient to support a conviction such as to sustain petitioners' motion for a judgment of acquittal, and that the petitioners' rights were substantially prejudiced when the Trial Court allowed instruction 33 tendered by the United States to be given to the jury. On appeal, the Court of Appeals affirmed, holding that the evidence was sufficient to prove that petitioners agreed to possess beef stolen from an interstate shipment and that the trial judge properly instructed and advised the jury after it

had commenced its deliberations. The opinions of the Court of Appeals did not mention petitioners' appeal point that Government instruction 33 substantially prejudiced the petitioners.

REASONS FOR GRANTING THE WRIT

I.

A writ of certiorari should be granted because the Court of Appeals decided this case in a manner that is in conflict with the recent decision of this Court in Jackson v. Virginia, ___ U.S.___, (No. 78-5283, June 28, 1979). In the Seventh Circuit the standard of review in passing on the sufficiency of the evidence to convict is to determine whether substantial evidence taken in the light most favorable to the government tends to show the defendant is guilty beyond a reasonable doubt. United States v. Brown, 518 F.2d 821 (7th Cir. 1975). In Brown, the 7th Circuit answered the question, did the

evidence support a finding of premeditation, by stating: We believe the evidence of such a violent killing strongly tends to prove the killing was done maliciously and with premeditation and that it also reflects the state of mind of Brown before and during the successive stabings. Id. at 827-828. Under Jackson, the proper inquiry is to find whether upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Because the Seventh Circuit standard only requires that the evidence tend to show guilt beyond a reasonable doubt, the standard applied by the Court below was unconstitutional and not in accord with the decisions of this Court. As such, a writ of certiorari should be granted. See, Helvering v. Wiese, 292 U.S. 614 (1934).

This case is particularly well suited for review in light of Jackson

because the Court of Appeals did not state in its opinion what standard of review it was actually applying. The opinion does not even mention reasonable doubt. The implication in Jackson is that the reviewing Court must be satisfied that there was guilt beyond a reasonable doubt. The Jackson decision should be clarified so that courts know whether it is they, the jury or both who should be convinced of guilt beyond a reasonable doubt. Clarification of such an implication should be grounds for granting a writ of certiorari. See, S.E.C. v. United Benefit Life Insurance Co., 387 U.S. 202 (1966).

This case also presents the important question of the scope of Jackson's applicability. Jackson was a federal habeas corpus action. In Re Winship, 397 U.S. 358 (1970), upon which the Jackson opinion drew heavily, was on appeal from the highest court of a state.

A writ of certiorari should be granted to determine Jackson's applicability to a United States Court of Appeals review of a Federal District Court conviction. The concurring opinion in Jackson reflects the concern that Jackson will not be limited to the precise facts to which its rule is originally to be applied. Involved with this is the concern for the workload of federal judges. This case thus presents issues that have a substantial impact to the administration of criminal justice on the federal level.

II.

Petitioners were denied a trial by an impartial jury due to coercion placed on them by the Trial Court and the Court of Appeals erred in not so holding.

Petitioners contend that on three separate occasions the Trial Court improperly coerced the jury resulting in a denial to petitioners of a trial by an

impartial jury and due process of law.

a.

The Trial Court improperly confused the jury when it re-read two instructions on possession without distinguishing their application to each count. Petitioners had been charged with conspiring to steal goods and chattels from an interstate shipment and with possession thereof in violation of 18 U.S.C. Sections 371, 659. After receiving a note from the jury, the Trial Court re-read two instructions on possession which had been previously given to the jury without distinguishing their application to each count in the indictment.

The Court of Appeals held there was no error beause the trial judge re-read the definition of possession only as it applied to Count II as requested by the jury. The Court of Appeals further held that because there was no conviction

under Count II, and the instruction read 'could not have conceivably prejudiced' petitioners in connection with Count I, there was no error or prejudie. (Appendix A, p. 29). However, the Court of Appeals failed to recognize the fact that that two instructions which had been re-read to the jury had originally been given as applying to both counts. By not limiting the definition of possession to only the possession charge, the trial court confused the jury on that term's application to the conspiraccy charge. An instruction dealing with the definition of possession does not have the same meaning when it is applied to a conspiracy charge as it does when it is applied to a possession charge. The fact that there occurred no conviction under Count II does not mean that the jury was not aided by these instructions in achieving a conviction under Count I, and contrary to the asser-

tion made by the Court of Appeals, the instruction could have conceivably prejudiced the petitioners in connection with Count I.

This Court has held that special care must be exercised in framing supplemental instructions if prejudice to a defendant is to be avoided. See, Burton v. United States, 196 U.S. 283 (1905). Where the jury, desiring additional instructions, makes explicit its difficulties, the trial judge should clear them away with concrete accuracy. Bollenbach v. United States, 326 U.S. 607 (1946); Powell v. United States, 347 F2d 156 (9th Cir. 1965). In the case at bar, it can hardly be said that the Trial Court was concretely accurate in its response to the jury's inquiry. Although the jury specifically requested a definition of possession, the trial judge assumed that their only reason was a lack of understanding

of possession. However, it is possible that the jury had another question in mind as in the case of Powell v. United States, 347 F.2d 156 (9th Cir. 1965), where it was concluded that the court's additional instructions to the jury may have led to the application of a standard which was improper.

b.

The Trial Court improperly coerced and misled the jury when it re-read an instruction favorable to the Government without mentioning the petitioners' presumption of innocence or the quantum of proof needed to convict. A second note was received from the jury during their deliberations requesting a definition of the second count of the indictment. The entire indictment was given to the jury. A third note was received from the jury requesting the judge to read 18 U.S.C. Section 659. The Court granted this request.

Petitioners submitted that a re-reading of this statute tended to force a verdict against them by unduly underscoring other aspects of the case. They contended that because the supplementary instruction omitted all reference to the presumption of innocence and the quantum of proof needed to convict, an impermissible imbalance was created between the government's case and the defendants' case yielding prejudicial error.

The Court of Appeals held that the judge did not need to repeat instructions on the government's burden of proof and the presumption of innocence and could properly answer the jury's specific request. The Court further stated that there was nothing in the record to suggest that the jury was confused, and it was not to be presumed that the jury misunderstood and failed to remember portions of instructions which it did not ask to be

read. (Appendix A, p. 29). It is difficult to see how the Court of Appeals concluded that there was nothing on the record to indicate jury confusion when at least four notes were sent by the jury to the judge requesting supplemental instructions and a clarification of instructions.

A reading of those instructions relating to the presumption of innocence and the government's burden of proof was needed, not because the jury might fail to remember these instructions, but to prevent the supplementary instruction from being slanted in favor of either side. United States v. McCracken, 488 F.2d 406 (5th Cir. 1974).

The petitioners were, in effect, denied the opportunity of having the jury informed, at the time of the supplementary instruction, of their presumption of innocence and proof beyond a reasonable doubt standard needed for conviction in

criminal trials; guaranteed by the Due Process Clause of the Fifth Amendment. United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970), United States v. Harris, 388 F.2d 373 (7th CCir. 1967).

c.

Coercion occurred when the Trial Court sent additional verdict forms to the jury and commented that "It would be useless to declare a mistrial if you are unable to render a complete verdict." After the jury had sent a fourth note to the Trial Court, the Court, on its own motion, speculated that the jury was having a problem coming to a verdict and submitted additional verdict forms. This conduct was calculated to achieve the same purpose as the Allen Charge, namely, to wrest a verdict form a potentially hung jury and coerced petitioners' jury. See, United States v. Silvern, 484 F.2d 879 (7th Cir. 1973).

The additional verdict forms coupled with the Court's language in giving these instructions (Appendix A, p.39, improperly coerced the jury in reaching their verdict. The Court's language reflected the assessment that the facts of the case were relatively easily resolved and pressured the jurors to come to a result. This type of coercion requires reversal. See, Jenkins v. United States, 380 U.S. 445 (1965); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971).

III.

The petitioners assert the United States Court of Appeals for the Seventh Circuit violated their rights of due process of law when it failed to pass upon one of the appeal points. On appeal, the petitioners contended that the District Court erred when it allowed an objected to instruction to reach the

jury. The Court of Appeals, however, did not address that particular point in its Order and Opinion. The District Court's judgment was affirmed in total. The petitioners were thus deprived of their constitutional rights since no opinion regarding that issue was rendered. Consequently, there was a departure from the accepted and usual cause of judicial proceedings.

Rule 19 of the Rules of the Supreme Court of the United States provides in relevant part that:

> 1. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict

> with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed fromm the accepted and usual cause of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

A Writ of Certiorari should be granted to the present petitioners. The United States Court of Appeals is a reviewing Court. Primarily, its function is to judicially re-examine possible errors which may have arisen in the lower court.

In order for the parties in an appeal to have these possible errors corrected, the court of Appeals must consider the matters presented before it. There must be a concrete determination of all issues. This issue determination requires the Court in its Order and

Opinion to at least respond to each issue. Otherwise, the parties have no way of knowing whether due process of law has been accomplished.

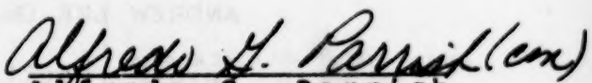
If the above procedures are not followed, then there may be legal or factual grounds which are not considered. This failure to consider then leads to reasonable doubt regarding the correctness of the decision.

In the present case, there is reasonable doubt as to the correctness of the Court's opinion since no mention whatsoever is made regarding the objected to jury instruction. The petitioners have no way of knowing whether or not that particular issue was given a full and adequate determination. Consequently, the Writ of Certiorari should be granted to the petitioners.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

PARRISH & DEL GALLO



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ATTORNEY FOR PETITIONERS

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

RODNEY ALEXANDER, and

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TO THE UNITED STATES COURT OF

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

(ARGUED MAY 29, 1979)

June 12, 1979.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WALTER P. GEWIN, Senior Circuit Judge*/

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 78-1587 and 78-1588 vs.	
RODNEY ALEXANDER and ANDREW LEE OWENS, Defendant-Appellants.	No. 76-CR-364
	J. Sam Perry, Judge

ORDER

Defendants were charged in a two-count indictment with conspiring to possess (Count 1) and possession of (Count 2) meat stolen from interstate commerce, in violation of 18 U.S.C. §§ 371 and 659. A jury returned guilty verdicts against both defendants on the conspiracy count but reported it was unable to reach a verdict on the possession count. The court declared a mistrial on the possession count, which was later dismissed, and entered judgments and imposed sentences on the conspiracy count, from which defendants appeal.

---

*/ The Honorable Walter P. Gewin, Senior Circuit Judge of the the United States Court of Appeals for the Fifth Circuit, sitting by designation.

On appeal the defendants challenge the sufficiency of the evidence and argue that the trial court improperly instructed and advised the jury after the case was submitted to the jury for its consideration.

The evidence was sufficient to prove that defendants agreed to possess beef stolen from an interstate shipment. According to testimony the jury was entitled to believe, both defendants participated in negotiating the price of the beef in question and later diverted it from its route with the intention of appropriating it to their own use by selling it. Although the beef was stolen as soon as defendants diverted it from its original course, United States v. Fusco, 398 F.2d 32, 35 n.2 (7th Cir. 1968), proof of actual theft was unnecessary to establish conspiracy. Proof that defendants intended to steal the beef and committed any overt act directed toward accomplishing that end was sufficient to establish the crime of conspiracy to possess stolen beef. See United States v. Rose, 590 F.2d 232, 235-236 (7th Cir. 1978).

Defendants' argument that the trial judge improperly instructed and advised the jury after it had commenced its deliberations is also without merit. The judge properly responded to the jury's request for a "definition of possession as instructed in second charge of indictment" by rereading the definition of possession as it applied to that count. The jury's question gave no occasion to refer to any distinction between Count 1 and Count 2. Since there was no conviction under Count 2, and the instruction could not have conceivably prejudiced the defendants in connection with Count 1, there is neither error nor prejudice.

The trial judge has discretion to provide the jury with a copy of the indictment for use during deliberations. His doing so, therefore, would not have been error even if defendants had objected, which they did not.

It was not error to reread 18 U.S.C. § 659 to the jury in response to its request without repeating the instructions on the government's burden of proof and the presumption of innocence. The judge could properly answer the jury's specific request without reiterating other instructions. It is not to be presumed that the jury misunderstood and failed to remember the portions of the instructions which it did not ask to be reread. Unlike the record in United States v. Harris, 388 F.2d 373 (7th Cir. 1967), cited by defendants, the record here contains nothing to suggest that the jury was confused by the supplemental instructions given by the court pursuant to the jury's request.

Finally, the trial judge did not err in supplying additional verdict forms or explaining his reason for doing so. The requests made by the jury, including the final one, which the judge did not answer, related to Count 2 and

indicated that the jurors were having difficulty with that count; there was no indication of any problem with respect to Count 1. The judge, without attempting to determine how the jury stood or whether any verdict it might have reached with respect to either count was favorable to the government or the defendants, did what was necessary to make it possible for the jury to return a verdict if agreement could be reached as to a defendant on only one of the two counts. This action was not an attempt to coerce the jury to reach a verdict and was entirely reasonable and proper under the circumstances. Read in context, the judge's explanation to the jury as to why he was tendering additional forms of verdict was not prejudicial. The judge stated:

> I am giving you these instructions and it might be that you are in agreement on one of the other counts on one or the other defendants and it would be useless to have to declare a mistrial if you are unable to render complete verdicts. So I am giving you the option of returning the verdicts that you are able to return. With that in mind, I will now return you to the jury room. The other forms of verdict did not afford that opportunity and this one does.

While the court reporter seems to have somewhat garbled the judge's statement, it obviously communicated to the jury the idea that the purpose of the new forms of verdict was simply to allow them to return any verdict they were able to return. Defendants' counsel or we, given hindsight and ample time, might be able to improve upon the judge's explanation to the jury, but the judge did not have these advantages at the time he had to speak. His statement and action were not coercive and were not error.

The judgments of conviction are affirmed.

AFFIRMED.

APPENDIX B

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United States Constitution, Ammendment VI. In all criminal prosections, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. Section 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any maner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

If, however the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 659 provides in pertinent part: Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which consti-

tute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device,

scheme, or game, from any railroad car, bus, vehicle steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen--

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have ben committed not only in the district where the violation first occurrd, but also in any district in which the defendant may have taken or been in

possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

Supreme Court Rule 19 provides in pertinent part: A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor

fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed fromm the accepted and usual cause of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) SS:
COUNTY OF POLK)

I, Alfredo G. Parrish, depose and state that I am the attorney of record for Rodney Alexander and Andrew Lee Owens, the petitioners herein, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Peition for a writ of certiorari on each of the parties required to be served herein, as follows:

On the Solicitor General, Department of Justice, Washington, D.C. 20530, respondent herein, by mailing three copies in a duly addressed envelope with first class postage prepaid; to Thomas P. Sullivan, United States Attorney, counsel of record for said respondent, at the United States District Courthouse, 219 S.

Dearborn St., 15th Floor, Chicago, Illinois 60604.

Alfredo G. Parrish (cm)

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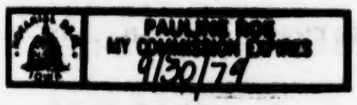
ATTORNEY FOR PETITIONERS

Subscribed and sworn to before me this 16th day of July, 1979.



Pauline Roe
Notary Public
State of Iowa